Petition

81-1188

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IN THE

Supreme Court of the United States

October Term, 1981

RONALD MONROE

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Paul D. Montclare
20 Broad Street
New York, New York
(212) 422-6767
John D. Calandra
Calandra & Castaldi
1334 East Gun Hill Road
Bronx, New York 10469
(212) 654-5000
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Court below violated petitioner's Fourteenth and Sixth Amendment rights to due process and the effective assistance of counsel in that the Court below refused to allow petitioner to withdraw his plea of guilty prior to sentencing where (a) the petitioner moved to withdraw his plea prior to sentencing on the stated ground that the joint representation by a single attorney of petitioner and a co-defendant during plea bargain negotiations created a conflict of interest that deprived petitioner of the effective assistance of counsel, (b) there was no prejudice to the prosecution attendant to the withdrawal of the plea prior to sentencing and (c) the petitioner, prior to withdrawing his plea of guilty was not advised by the trial court nor counsel of the potential conflict of interest arising from joint representation during plea bargaining, and that under these circumstances, the petitioner, having stated his reason for withdrawal of the plea prior to sentencing, was not required to prove the merits of his reason for so doing.

2. Whether an informal hearing before the trial court regarding the merits of petitioner's claim of conflict of interest was conducted in such a manner as to deprive peitioner of minimal procedural safeguards and a fair opportunity to be heard resulting in a prejudicial interference with petitioner's attorney-client privilege in violation of his right to due process and the effective assistance of counsel under the Sixth and Fourteenth Amendments of the Constitution.

3. Whether on the record presented a conflict of interest in fact existed as a result of defense counsel's joint representation of petitioner and a co-defendant at the plea bargaining stage so as to deprive petitioner of the effective assistance of counsel.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

RONALD MONROE,

Petitioner

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Petitioner, Ronald Monroe, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Court of Appeals of the State of New York rendered on October 27, 1981 in this case.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of the State of New York denying petitioner's application to withdraw his guilty plea and judgment of conviction were rendered orally in a proceeding before the court on March 16, 1979 and are unreported. Pages from the transcript of this proceeding in which these opinions and rulings were made is set forth in Appendix A. The order of the Appellate Division of the Supreme Court of the State of New York First Judicial Department was without opinion, is unreported and is set forth in Appendix B. The majority and dissenting opinions of the Court of Appeals of the State of New York are not yet reported and are set forth in Appendix C.

JURISDICTION

The decision of the Court of Appeals of the State of New York was rendered on October 27, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

4. The Sixth Amendment of the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

> informed of the nature and cause of the accusation; to be confronted with the Witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

5. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 2, 1978, petitioner was indicted along with a co-defendant, Frederick Bryant, and accused of acting in concert with Bryant in connection with the wounding of Ernest Nelson in a shooting incident which occurred in the early morning hours of December 10, 1977. The indictment charged both petitioner and Bryant with attempted murder in the second degree, assault in the first degree, and two counts of criminal possession in the first degree. The petitioner had no prior criminal record of any kind as either a juvenile or an adult. On March 16, 1979, a Justice of the Supreme Court of New York, Bronx County, rendered a criminal judgment against petitioner convicting him of attempted assault in the first degree (a class D felony). This judgment was entered solely as a result of a plea of guilty which defendant attempted to withdraw prior to judgment and sentencing. Petitioner had originally entered this plea of guilty as a part of a plea

bargain package negotiated by a single attorney, Mr. Otto Fusco who jointly represented both petitioner and co-defendant Byrant. The record shows that at no time prior to the plea did Mr. Fusco advise the petitioner of the potential risk of conflict of interest which could arise in connection with the joint representation of petitioner and Bryant. (R. 17).[1] Instead, Mr. Fusco undertook to negotiate a plea bargain package deal on behalf of both petitioner and Bryant. On June 20, 1978, petitioner, wholly unaware of the potential risks inherent in Fusco's joint representation, and relying on what Mr. Fusco had told him about the plea bargain negotiations, pled guilty to the charge of attempted assault in the first degree (a class D felony). A sentence was not imposed at that time nor was a judgment of conviction entered. (R. 27–32)

Shortly after pleading guilty, but prior to sentencing, petitioner, on his own initiative retained new and independent counsel who was formally substituted for Mr. Fusco on September 11, 1978 (R. 52). Petitioner, through his new counsel, moved to withdraw his prior guilty plea on the ground that there was an inherent conflict of interest in this case because of the joint representation by Fusco of petitioner and Bryant (R. 12, 20–21). Petitioner protested his innocence and contended that Fusco had informed him that his plea of guilty would make it easier for Fusco to obtain a lesser sentence for Bryant. (R. 12)

In response to petitioner's application to withdraw his guilty plea the trial court on January 24, 1979, held an "informal" hearing for the ostensible purpose of determining whether a conflict of interest in fact existed. (R. 11–12, 38). The transcript of this "informal hearing" reveals

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1. Citations in parentheses designated by the letter "R" refer to pages of transcripts of proceedings before the trial court which transcripts were submitted by petitioner to the New York State Court of Appeals as part of the Record on Appeal.

beyond any doubt that by any standard there was no meaningful inquiry into petitioner's contention that a conflict of interest existed. Instead, nearly the entire transcript is comprised of highly unreliable, inaccurate, prejudicial, and improper unsworn statements made by petitioner's former attorney, Mr. Fusco who, while admitting that his file on this case had been closed and that he did not have a clear recollection of key facts, (R, 15) nevertheless was undaunted in offering his view of the "facts" surrounding the shooting.

The statement given by Mr. Fusco is replete with inaccuracies which are obvious from a review of other parts of the record which conclusively contradict Fusco's remarks. For example, Fusco stated:

> "Now they both had guns, this defendant and the co-defendant, as I have said. Fortunately for [Monroe] the co-defendant [Bryant], mind you, who was not involved at all in this situation, his bullet that he fired, I don't know how many bullets struck the complainant, I don't have the file here, its closed, the bullets that struck the complainant came from the gun of the co-defendant. [Bryant]" (R.14)

However it is clear that only one bullet was fired from one gun and that gun was fired by Bryant. The trial court, by reference to the probation report in this case, set forth the following facts at a later sentencing hearing:

> "*Bryant* fired *a* shot at the complainant," (R. 42) "Two police officers heard *a* gun discharging." (R. 43). . . "The police, using a flashlight, looked into the car and observed the barrel of a gun under the front passenger seat. They also noticed a second gun under the seat. Both weapons were loaded. *One* had a spent shell, indicating that it had been fired.

(R. 43) "The guns were a forty-four calibre revolver loaded with five live rounds, and a thirty-eight calibre, quote revolver loaded with five rounds and one spent shell." (R. 44)

Notwithstanding the remarkable inconsistencies and inaccuracies in Fusco's statement, new defense counsel was totally thwarted in any attempt to contradict or impeach it. The following exchange took place directly after Fusco's statement:

The Court: Well I have no further questions gentlemen. We've had a hearing now. As far as I'm concerned I think that what has been said will satisfy the record." (p. 20)

Mr. Spitz: Well, I would like to make a statement for the record.

The Court: Certainly, counsel. Go right ahead.

Mr. Spitz: Because I was astounded at some of the things Mr. Fusco said. There is no evidence whatever in this case. This defendant made no statement whatever that implicated him as acting in concert—

The Court: I don't think Mr. Fusco, indicated that.

Mr. Fusco: I never stated that.

. . .

Mr.Spitz: I don't want the record to indicate that there was any – there's any evidence whatever. . . . My position is that from the very facts of the case, there's an intrinsic conflict of interest, that Mr. Fusco could not legally or intelligently advise both clients under the particular fact situation. And as a matter of law there's a conflict of interest. (R. 20–21).

At that point the trial court cut off any further inquiry. It is clear that this "informal" hearing was devoid of any procedural safeguards and did not afford the petitioner a fair opportunity to challenge Mr. Fusco's damaging, yet inaccurate and improper statements. It is equally clear that regardless of Fusco's protestations to the contrary his joint representation of petitioner and Bryant demonstrates an obvious conflict of interest. There can be no serious doubt that Fusco was negotiating a "package deal" on behalf of both defendants and that he was having difficulty negotiating a plea on behalf of Bryant. The following exchange is revealing:

Mr. Fusco: . . . It took me a long, long time to get the pleas

that I did in this particular case. I think the plea co-defendant [Bryant] received was nine years.

Mr. Weinstein [Assistant District Attorney]: yes

Mr. Fusco: And I had to work it out because your Honor, I think at the time wanted to fix a minimum and I spoke to your Honor and then we agreed let it be one to nine rather than fix a minimum.

The Court: That's correct. I recall that.

Mr. Weinstein: Yes, it is.

Mr. Fusco: And as to this defendant, at the same time it was agreed, I think—

Mr. Weinstein: Zero to four

Mr. Fusco: One to four

The Court: What was the District Attorney's recommendation in this case on the sentence of the defendant?

Mr. Weinstein: On the other Defendant [Bryant], the People were asking for three and a third to ten. On this

defendant we were asking for the D[Felony] and came down to four years.

Mr. Fusco: And I was the one who had to maneuver all of it. (R. 15–16)

This passage clearly demonstrates that Mr. Fusco in negotiating this package deal was having difficulty getting the District Attorney to reduce the plea of Bryant, the actual confessed gunman, from a 3 1/3 to 10 years sentence recommended by the District Attorney. He was obviously also having a difficult time trying to convince the trial court that Bryant should not receive a lengthy minimum sentence in light of a confession to attempted murder. At the same time Mr. Weinstein's testimony shows that the District Attorney was only seeking a plea to a class D felony charge against petitioner which is precisely the same charge to which he ultimately pled guilty.

The record in this case also shows that there was a tremendous disparity in both the quantity and quality of evidence with respect to the petitioner and Bryant. Bryant had given a full stenographic confession, petitioner had not (R. 23); Bryant had fired the only shot that wounded the complainant, petitioner did not (R. 42–44); the weapons were found under the passenger seat of the automobile at the time of arrest (R. 43) and the petitioner was the driver and Bryant the passenger. (R. 45)

Indeed, consistent with petitioner's desire to plead not guilty, it is clear that if petitioner who had no prior criminal record had been allowed to withdraw his plea, he would have testified at trial and his testimony would have implicated Bryant as a necessary concomitant to a defense that he was unaware that Bryant intended to shoot at and attempt to kill Nelson. Mr. Fusco's awareness of a conflict

of interest is apparent in his own self-contradictory statement:

> Mr. Fusco: So, I submit here Judge, with the pleas that have been offered to both of these defendants, it took much energy on my part and there's no conflict because they were acting in concert. The motive, the problem here was Monroe's problem and not the co-defendant's problem and unfortunately, as I say, Monroe's gun did not strike the complainant. (R. 17)

It is incredible that Mr. Fusco can state that there is no conflict and then immediately go on to state that the petitioner had a motive and Bryant did not and that Bryant shot the complainant and Monroe "unfortunately" did not. There simply can be no question of the impropriety of Mr. Fusco's joint representation in light of his total failure even to inform petitioner of the dangers of conflict of interest arising from his joint representation.

Moreover, Petitioner's application to withdraw his plea was made well in advance of sentencing after obtaining independent counsel, and the District Attorney did not, because it could not, make any showing of prejudice attendant to the withdrawal of petitioner's plea.

As will be shown below, the New York courts have erred in refusing to allow the withdrawal of petitioner's guilty plea prior to sentencing, and in fact the application of established constitutional principles mandate reversal of

petitioner's conviction. Yet, despite petitioner's objection and application to withdraw his guilty plea prior to sentencing, despite petitioner's protestations of innocence, despite the fact that petitioner was never informed of the substantial potential of conflict of interest occasioned by the joint representation by Fusco prior to pleading guilty, and despite the fact that the prosecution did not and could not make any showing of undue prejudice to the prosecution resulting from the withdrawal of the guilty plea, the trial court refused to allow petitioner to withdraw the guilty plea and stand trial and instead sentenced the petitioner to zero to four years imprisonment without a trial based solely on the guilty plea petitioner was attempting to withdraw.

By an order of December 20, 1979 petitioner's conviction was upheld without opinion by the Appellate Division. (Appendix B) And, on October 27, 1981 the New York Court of Appeals, in a four to three decision affirmed petitioner's judgment of conviction, holding that the hearing held by the trial court was sufficient to establish that there was not a conflict of interest in fact and that, in the absence of a showing of actual conflict the withdrawal of the plea of guilty was not constitutionally mandated in light of *inter alia*, this Court's ruling in *Cuyler v. Sullivan* 446 U.S. 335 (1980). (Appendix B, P. A-12).

REASONS FOR GRANTING THE WRIT

A. The Decision Below is in Conflict with the Rule Expressed by the Majority of This Court in *Dukes v. Warden* and *Santobello v. New York*, and Misapplies This Court's Rule in *Cuyler v. Sullivan*.

The state court's refusal to allow the withdrawal of a plea of guilty prior to sentencing is contrary to the rule expressed by 4 of the 7 members of this Court in 1971-1972 in *Dukes v. Warden*, 406 U.S. 250, (1972) and

Santobello v. New York, 404 U.S. 257 (1971). This majority stated that in a plea bargaining situation a defendant has a constitutional right to withdraw a plea of guilty any time prior to sentencing absent a showing by the prosecution of specific and substantial harm occasioned by such withdrawal. (Opinions of Stewart, J. concurring at 257–258; Marshall J. dissenting joined by Justice Douglas at 266–269) and *Santobello v. New York*, 404 U.S. 257, 263–269, (1971) (Douglas, J. concurring at 264–267 and Marshall, J. joined by Justices Stewart and Brennan concurring in part and dissenting in part at 267–269.).

This Court has clearly indicated that in plea bargain situations a defendant has a constitutional right to withdraw his plea of guilty at any time prior to sentencing, and that a defendant having stated his reason for withdrawal of the plea need not assume any further burden regarding the merit of his reason. This is expressed in *Dukes v. Warden*, 406 U.S. 250, (1972):

> ". . . I agree that where the defendant presents a reason for vacating his plea [of guilty] and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment... If a defendant means to withdraw a guilty plea before judgment and if he states a reason for doing so, I think that he need not shoulder a further burden of proving the "merit" of his reason at that time. Before judgment the courts should show solicitude for a defendant who wishes to undo a waiver of all constitutional rights that surround the right to trial–perhaps the most devastating waiver possible under our constitution. Any requirement that a defendant prove the "merit" of his reason for undoing this waiver would confuse the

> obvious difference between the withdrawal of a guilty plea before the government has relied on the plea to its disadvantage, and a later challenge to such a plea, on appeal or collaterally, when the judgment is final and the government clearly has relied on the plea." 406 U.S.250, 257- 58 (Justice Stewart, concurring).

The Constitutional underpinnings of this rule are clearly set forth in Justice Marshall's separate concurrence in *Dukes v. Warden*, Id. at 264–266 and the concurring opinion of Justice Marshall (with whom Justice Brennan and Stewart joined), in *Santobello v. New York* 404 U.S. 257, 267–268 (1971).

As Justice Marshall persuasively states:

> [A] guilty plea is a serious and sobering occasion in as much as it constitutes a waiver of the fundamental rights to a jury trial,... to confront one's accusers... to present witnesses in one's defense. . . to remain silent. . . to be convicted of proof beyond all reasonable doubt. . . . The preconditions for all these rights is the constitutional "right not to plead guilty" *United States v. Jackson*, 390 U.S. 570, 581, 20 L. ED 2d 138 146, 88 S. Ct. 1209 (1968).

(only citations have been omitted) *Dukes v. Warden*, *supra*, at 264–65. *See also* Justice Douglas, concurring *Santobello v. New York*, supra at 263- 64.

As a result of these constitutional rights and the onerous effects attendant to their waiver Justice Marshall wrote:

> We view guilty pleas with the "utmost solicitude" because they involve the simultaneous waiver of so many constitutional rights; our system of laws favors the rights, not their waiver. It is inconsistent with that basic viewpoint for guilty pleas to be irrevocable even before sentencing. Usually because of new information or new insights, defendants may have "sober second thoughts" about their pleas.
>
> A guilty plea is not a trap. Ordinarily, a defendant who changes his mind for sufficient reason and in timely fashion should not be deemed to have waived his right to a full trial. In short, absent the government's showing specific and substantial harm, I would generally permit withdrawal of the plea before sentencing.

Dukes v. Warden, Id. at 266 (Justice Marshall, concurring).

Thus, as articulated by four of the seven Justices of this Court in the opinions rendered in *Dukes* and *Santobello*, where a defendant seeks to withdraw a plea of guilty *prior to sentencing*, he need only state a reason for so doing and is not put to the test of proving the merits of his reason. Since the *Dukes* decision, this Court has not addressed the issue raised by a trial court's refusal to allow a defendant to withdraw a plea of guilty prior to sentencing. Since plea bargaining is so pervasive in the administration of criminal justice, and the waiver of rights attendant to a refusal to allow a withdrawal of a guilty plea continues to be so onerous, it is submitted that this Court should exercise its discretion in this case to establish the

vitality of the majority position in *Dukes v. Warden* and *Santobello v. New York*.

Cuyler v. Sullivan distinguished.

This Court should grant certiorari to distinguish the post-trial conflict of interest rule set out in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) from the rule in *Dukes* and *Santobello* relating to the withdrawal of a plea of guilty made prior to sentencing.

The rule expressed by the majority of the Court in *Dukes* and *Santobello* applies where a defendant seeks to withdraw his plea *prior to sentencing*. This rule must not be confused with this Court's recent ruling in *Cuyler v. Sullivan*, supra, where a defendant sought to set aside a conviction *after trial and sentencing*, and where the defendant raised the conflict of interest point for the first time after trial. It is clear that pursuant to the *Cuyler* rule, only where a defendant for the first time after trial and conviction seeks to set aside that conviction based on allegations of conflict of interest arising from joint representation does the Court hold that the burden is on the defendant to prove the merits of his claim of conflict of interest.

The New York Court of Appeals was apparently unpersuaded by the importance of this distinction, even though the majority of this Court in *Dukes* and *Santobello* explicitly recognized that a different standard applies in a situation where a defendant attempts to withdraw a guilty plea prior to sentencing as opposed to when, as in *Cuyler* a defendant seeks a reversal based on alleged conflict of interest which is raised for the first time by a defendant after trial and conviction.

As Justice Stewart stated:

> The petitioner does not challenge the refusal of the trial court to permit him to withdraw

> his guilty plea before judgment. Rather, he challenges a later refusal by the trial court to vacate his plea on a motion made well after judgment and sentence, presenting a claim not previously raised.
>
> Thus I agree with the Court that the petitioner's claim should be evaluated under the standards governing an attack on a guilty plea made after judgment, not under the far different standards governing a motion to withdraw a plea made before judgment has been pronounced.

Dukes v. Warden supra 406 U.S. at 258; see also 406 U.S. at 266 (Opinion of Justice Marshall).

Therefore, we respectfully submit that certiorari be granted so that the petitioner's conviction may be reversed consistent with the prior majority position of this Court, and so that this Court may make a further definitive holding of the rules relating to the withdrawal of a guilty plea prior to sentencing, especially in a plea bargaining context.

Moreover, in a plea bargain situation where a defendant attempts to withdraw a plea before sentencing on the basis of conflict of interest arising out of joint representation, it is clear that it is both unnecessary and unwise to compel him to prove the "merit" of his conflict of interest claim.

This Court has recognized the importance of the defendant being made aware of the potential hazards of joint representation in the context where the defendant raised the conflict issue prior to trial. *Holloway v. Arkansas*, 435 U.S. 475, 481 – 487 (1977) (opinion of the Court delivered by Chief Justice Warren Burger, joined by Justices Brennan, Stewart, White, Marshall and Stevens).

by Justices Brennan, Stewart, White, Marshall and Stevens).

This Court also warned in *Holloway*, that while a trial court may explore the adequacy of the basis of defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client, "such compelled disclosure creates significant risks of unfair prejudice, especially when the disclosure is to a judge who may be called upon later to impose sentences on the attorney's clients" *Holloway* v. *Arkansas* Supra at 436, fn. 11. However, the Court found that that case did not require such an inquiry and therefore did not reach the issue as to the extent of a court's power to compel or restrict the degree of an attorney's disclosure of confidential communications in light of a defendant's presentencing and pretrial application to withdraw a guilty plea based on a claim of conflict of interest.

This issue, however is clearly presented by the facts in this case. It would certainly be anomalous to require the defendant who is claiming ineffective assistance of counsel to make a detailed pretrial disclosure of otherwise privileged facts and strategy of his case in order to withdraw a plea of guilty prior to sentencing and then have to proceed to trial before the same Judge and District Attorney who have been made privy to what otherwise would be confidential information. Such a requirement would necessarily invade the protection of attorney-client communications which are themselves key to the constitutionally guaranteed right to the effective assistance of counsel, and would unconstitutionally provide the prosecution with a prejudicial road map of the defendant's case. Accord, *United States v. Wisniewski* 478 F.2d 274, 285 (2d Cir. 1973); *People v. Gomberg*, 38 N.Y.2d 307, 313-314 379 N.Y.S.2d 769, 342 N.E.2d 550 (1975). *People* v. *Lloyd*, 51 N.Y. 2d 107, 432 N.Y.S. 2d 685, 412 N.E.2d 371 (1980). It is submitted that certiorari should be granted to address this issue so that the Court may set forth a standard indicating the

extent, if any, to which a court may compel disclosure of confidential information by an attorney and what constraints must be placed on an attorney in making such disclosures where a defendant seeks to withdraw a guilty plea prior to sentencing based on a conflict of interest arising from joint representation.

B. The Record Below Establishes That A Conflict Of Interest In Fact Existed And That Petitioner's Conviction Should Be Reversed.

Even if, arguendo, petitioner were required to meet some standard of proof as to the merits of his conflict of interest claim, there can be no doubt that the informal hearing conducted in this case did not provide even a modicum of due process which would have allowed the petitioner the opportunity to present evidence on his behalf and to cross-examine Mr. Fusco in order to establish the potential or actual conflict. Indeed, the dissenting opinion of the New York Court of Appeals observed that in the present case

> "The difficulty with a retrospective hearing to determine whether there was in fact a conflict is that it requires not only the recapture of the dynamics of plea bargaining,...in and of itself a difficult enough pursuit, but also the persuasion of the judges who failed to see the possibility of conflict in the first place and the attorney whose acumen, if not integrity, may be at stake, that they were in error and should admit it. True . . . the fact may indeed be that there was no conflict, but the odds against a finding of conflict resulting from such a hearing are so great and the effect upon the appearance of justice is so devastating that we can no longer argue to use of the procedure." Dissenting Opinion at 1- 2.

Finally, the factual record of this case shows that there is no question that, as a matter of law, a conflict of interest actually existed at the plea bargaining stage as a result of (i) Mr. Fusco improperly negotiating a "package deal" for petitioner and Bryant (See *Mone v. Robinson*, 430 F. Supp. 481 (D. Conn. 1977); *affd*, 573 F.2d 1293 (2d Cir. 1977); (ii) the confession of Bryant which apparently attempted to implicate petitioner (See *Sawyer v. Brough*, 358 F.2d 70 (4th Cir. 1966); (iii) the great disparity in the type and quantum of evidence against each co-defendant (*People v. Fioretti*, 49 N.Y.2d 976, 978, 428 N.Y.S.2d 889, 406 N.E.2d 746, (1980)); (iv) Mr. Fusco's plea bargaining efforts on behalf of petitioner were obviously influenced by his concern for Bryant against whom the evidence was overwhelming. *See generally*; *Alvarez v. Wainwright* 522 F.2d 100 (5th Cir. 1975); *United States v. Truglio*, 493 F.2d 574th (4 Cir. 1974); *United States* ex. rel *Taylor v. Rundle*, 305 F.Supp. 1036 (E.D. Pa. 1969); *Holland v. Bolles*, 225 F.Supp. 863 (N.D.W. Va. 1963) and Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney 62 Minn. L. Rev. 119, 126–127 (1978). Thus, under the facts of this case it is clear that the petitioner should have been allowed to withdraw his plea and stand trial, and that this court should issue a writ of certiorari so that the decision below may be reviewed by this Court and reversed.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul D. Montclare
20 Broad Street
New York, New York 10005
(212) 422-6767

Dated: New York, New York
December 24, 1981

John D. Calandra
Calandra & Castaldi
1334 East Gun Hill Road
Bronx, N.Y. 10469
(212) 654-5000
Counsel for Petitioner

APPENDIX A

A-1

INDICTMENT NO. 6/78

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : TRIAL TERM PART 201

THE PEOPLE OF THE STATE OF
NEW YORK

-against- SENTENCE

RONALD MONROE,

Defendant.

Bronx, New York
March 16, 1979

B E F O R E : HON. WILLIAM J. LOGUEN,
J U S T I C E

A P P E A R A N C E S :

FOR THE PEOPLE: MARIO MEROLA, ESQ.,
District Attorney : Bronx
By: BARRY WEINSTEIN ESQ.,
Assistant District Attorney

FOR THE DEFENDANT:
GEORGE R. SPITZ, ESQ.,
233 Broadway
New York, New York

Kathleen Stala
Court Reporter

Sentence

THE COURT CLERK: On the sentence calendar, number one, Ronald Monroe.

(Whereupon, the defendant and his attorney are present before the Court.)

THE COURT: Mr. Weinstein, you're in court again. You made a short statement before, the last time this was on. Could you elaborate on it a bit?

MR. WEINSTEIN: Yes, your Honor. Basically, the case that the People have against Mr. Monroe and his co-defendant, Mr. Bryant, the complaining witness is someone who knows Mr. Bryant and Monroe. There was a question—Ernest Nelson. There was a question on whether or not the complaining witness won the number, whether it was the night number of the day number, and it was alleged by the defendants that the complainant went after them.

On the day in question, the day that the complaining witness was shot, December 10, 1977, a little after six o'clock in the morning, the complaining witness was approached by the defendant, Mr. Monroe, and his co-defendant, Mr. Bryant. After a brief confrontation, the complaining witness was shot and critically injured, shot by—

THE COURT: Were they on foot or—

MR. WEINSTEIN: No, in a car. Mr. Monroe was the driver of a car. There were two guns in the car. The complaining witness alleged that each one had guns. He was shot and critically injured by Mr. Bryant.

The police officers, responding to a burglary in progress on another case, heard shots, respond, see Mr. Monroe, the defendant before us, behind the wheel of this car with the lights out. It was still dark out. It was about six o'clock in the morning on December 10th.

A chase ensued for several blocks: The lights in Mr. Monroe's car not being turned on, the car he was driving.

When he was stopped, he explained to them he had no license, no registration, no identification, that it wasn't his car. The police make a search, two guns are found which corroborated the complainant's story. They were each loaded. Each found operable.

The defendants were each placed under arrest. The defendant Bryant made a full and complete confession as to what happened, the involvement of both defendants. Mr. Monroe also made statements. He did not deny he was there, admitted he was there, admitted he was the driver and a statement in his own handwriting said, and I quote, "On December 10, 1977, I seen him about six a.m., took my own action because of what was done to me.", end of quote.

THE COURT: All right.

MR. WEINSTEIN: The contents of it mean that he saw the complainant, the complainant allegedly had been after him and he, with Bryant, took action. The complainant was then shot.

THE COURT: All right. I just wanted you to elaborate a bit on the statement you made.

Counsel, do you wish to be heard further?

MR. SPITZ: Well, I would just state again for the record, your Honor, that based on what the District Attorney stated here, there are serious legal questions here as to the guilt of the defendant and that there is, as a matter of law, there was a conflict of interest by the attorney representing both parties in this action.

THE COURT: All right, counsel. On June the— the delays in the ultimate disposition in this case have been due to getting the minutes of the various proceedings: The last

set of minutes was just obtained by the Court not long ago, and getting Mr. Fusco into court to make a statement. He had been on trial nearly constantly.

On June the 20th, 1978, the defendant and co-defendant, both represented by Mr. Otto Fusco, each pleaded guilty, the defendant herein to attempt assault in the first degree.

Now, new counsel protests his innocence and moves to vacate the guilty plea heretofore entered, claiming that he was denied the effective assistance of counsel and that he was induced to plead guilty by his former counsel, who had avised him that his guilty plea would help the co-defendant.

The defendant sees this as an intrinsic conflict of interest arising out of the joint representation about which he was not properly advised.

This accusation is not denied—is denied by his former counsel, Mr. Fusco.

When the pleas were entered, this Court had not made any inquiries as to possible conflicts.

The joint representation of defendants is not per se a denial of effective assistance of counsel and I site People versus Gonzalez, 30 NY 28 and 34. There was a conflict of interest only where the individual defenses run afoul of each other and I site the same case.

On January the 27th, 1979, Mr. Fusco made a statement at an informal hearing which was clear and convincing. He stated that after conferring with his clients it was clear to him that no conflict of interest existed since both defendants acted in concert in searching out and shooting the complainant.

Mr. Fusco indicated he informed the defendant that he had no chance of an acquittal on the attempted murder in the second degree charge and explained to him that on

the weapons charge alone, if convicted, he could be sentenced to a maximum term of seven years. He also advised him of the alternatives.

Now, Mr. Fusco's statements are corroborated, with respect to the acting in concert by the District Attorney who also shows that the defendant was the driver of the car, that there was a chase by the police before both defendants were apprehended in the car and that there were two loaded guns found in the car and that the defendant admitted seeking revenge.

It was also shown by Mr. Fusco and the Assistant District Attorney that the defendant, who had previously been shot at by the complainant, had the primary motive for retaliation.

Furthermore, the co-defendant made similar statements as indicated by the District Attorney after his arrest.

The defendant was allowed to plead guilty to attempted assault in the first degree with a plea bargain of zero to four years. This very fair disposition was achieved through effective assistance of counsel.

Legal principle herein is that a plea of guilty is itself a conviction and, like a verdict of a jury, it is conclusive. However, the plea must be voluntary after proper advice and with the full understanding of the consequences.

The minutes of the plea and the statements of Mr. Fusco in the instant case indicate clearly that the guilty plea was made freely and with full knowledge of the consequences and with the full benefit of legal counsel.

The practice of plea bargaining permits a defendant to avoid the inevitable risks and uncertainties of trial. And I site People versus Selikoff, 35 NY 2d 227, 33. Only rigorous adherence by the courts to a policy of affording guilty pleas a great measure of finality will immunize plea negotiations from indiscriminate pot shots, and I site People versus Frederick, 45 NY 2d 520 and 525.

Sentence

A defendant is not entitled to withdraw his plea based on a subsequent unsupported claim of innocence where the guilty plea was voluntarily made with the advice of counsel following an appraisal of all the relevant factors, including the likelihood of eye witness testimony confronting him at a trial and the hope of a reduced charge and sentence site People versus Dixon, 29 NY 2d 55 and 57.

In addition, there has been no adequate showing that the defendant was deprived of effective assistance of counsel because of the joint representation. The Court makes the following findings, that the statements made by Mr. Fusco are credible and that he properly advised the defendant of his rights and that the defendant knowingly and voluntarily entered the plea of guilty, that the defendant's decision to plead guilty to attempted assault in the first degree and to proceed with Mr. Fusco as his attorney was an informed one and I site People versus Gomberg (Phonetic), 38 NY 2d 307

And finally the Court finds that there was no conflict of interest in the joint representation of the defendant and the co-defendant.

For all of the above-mentioned reasons, the application of the defendant to withdraw his plea of guilty to attempted assault in the first degree is denied. So, we'll proceed with the sentence, counsel.

MR. SPITZ: May I note my exception on the record, your Honor?

THE COURT: Yes, counsel. Yes, counsel. Arraign the defendant for sentence.

THE COURT CLERK. Yes, your Honor. Ronald Monroe, on indictment 6 of 1978 you are now being arraigned for sentence on your plea of guilty to attempted assault in the first degree. The District Attorney will be given an opportunity to make a statement with respect to your sentence, your attorney, Mr. Spitz, will speak for you

and you have a right to make a statement to the Court in your own behalf before sentence is pronounced.

Do you understand that, Mr. Monroe?

THE DEFENDANT: Yes.

THE COURT: Mr. Weinstein, do you wish to be heard?

MR. WEINSTEIN: Yes, I do, your Honor. I would just ask that his Honor carry out the original agreement, that the defendant be sentenced to zero to four years.

THE COURT: Mr. Monroe, do you wish to be heard or do you want your lawyer to speak for you?

MR. SPITZ: I have nothing further to say to your Honor in connection with the —

THE COURT: You have read the Probation report, Mr. Spitz?

MR. SPITZ: Yes, I read the Probation report sometime ago.

THE COURT: All right, counsel. I've read the Probation report. The defendant apparently has no prior record as a juvenile, no record as an adult and no pending charges at the time the defendant entered the instant plea.

The report indicates that on the day in question the complainant left a club with a male friend. He proceeded to his automobile. Suddenly a 1977 Cadillac drove up, driven by the defendant, Monroe, with the co-defendant, Bryant, a passenger.

Bryant thereupon fired a shot at the complainant. A bullet entered his left cheek, passing his nose and lodging in his right cheek. The complainant collapsed and the defendant Monroe drove the car away.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 20, 1979

Present—Hon. Francis T. Murphy, Jr., Presiding Justice
Theodore R. Kupferman
Harold Birns
Leonard H. Sandler
Joseph P. Sullivan, Justices

The People of the State of New York,

Respondent,

-against-

Ronald Monroe,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment 7022

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Loguen, J.), rendered on March 16, 1979, convicting defendant of attempted assault in the first degree, and said appeal having been argued by Mr. George R. Spitz of counsel for the appellant, and by Johanna K. Resnick of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all

things, affirmed. The case is remitted to the Supreme Court, Bronx County, for further proceedings pursuant to CPL § 46010(5).

ENTER:

Joseph J. Lucchi

Clerk.

STATE OF NEW YORK
COURT OF APPEALS

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1 No.458
The People &c.,

Respondent,

v.

Ronald Monroe,

Appellant.

OPINION
This opinion is uncorrected and subject to revision before publication in the New York Reports.

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(458) Joseph A. Cascione & George R. Spitz, Bronx, for appellant.
Mario Merola, DA, Bronx County (Alan D. Kaplan & Johanna Kiel Resnick of counsel) for respondent.

PER CURIAM:

The issue presented on this appeal is whether defendant was deprived of effective assistance of counsel by reason of his attorney's joint representation of both defendant and his co-defendant in negotiating a plea bargaining agreement. While we hold today that in accepting a guilty plea from a jointly represented defendant, the Court must act to safeguard a defendant's right to effective assistance of counsel, we conclude, on the facts of this case, that defendant has not established that a significant possibility of a conflict of interest existed as to warrant a reversal of his conviction.

Defendant was indicted along with his co-defendant for the crimes of attempted murder in the second degree, assault in the first degree, and two counts of criminal possession of a weapon in the second degree. Pursuant to a plea bargaining agreement negotiated by the attorney for both defendants, defendant pleaded guilty to attempted

assault in the first degree.[1] While the Court determined at the time of defendant's plea that it was made in a knowing and voluntary manner, it did not ascertain whether defendant perceived the risks involved in representation of himself and his co-defendant by the same attorney.

Prior to sentencing, defendant retained separate counsel and moved to withdraw his guilty plea on the ground that his former attorney's representation involved a conflict of interest. The Court conducted a full hearing on this motion. Defendant claimed that his former attorney had told him that if he pleaded guilty, his co-defendant would be treated more leniently. That attorney denied ever having made such a statement. Substituted counsel argued that an "intrinsic conflict of interest" existed, because defendant had not been advised of the possibility of success if his case went to trial.

The Court, in denying the motion, found that original counsel had properly and fully advised his two clients as to their alternatives, that defendant's plea was knowingly and voluntarily made, and that no adequate showing had been made that defendant had been deprived of effective assistance of counsel. Finally, the Court, after reviewing the evidence in the People's possession, noted that defendant's attorney had negotiated a very fair disposition of the charges against defendant. Thereafter, the Court sentenced defendant to an indeterminate sentence not to exceed four years, pursuant to the plea bargaining agreement. The Appellate Division unanimously affirmed the judgment of conviction, without opinion. There should be an affirmance.

Initially, we deal with the question of whether our prior holdings in the area of joint representation, to the effect that the Trial Court must ascertain on the record whether jointly represented defendants perceive the risks of

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1. The co-defendant pleaded guilty to assault in the first degree and was sentenced to an indeterminate term not to exceed nine years.

that representation (*People v. Macerola*, 47 N.Y.2d 257; *People v. Gomberg*, 38 N.Y.2d 307), should be applied in a case where one attorney negotiates a plea bargain for multiple defendants. While we adhere to our belief that joint representation is not per se violative of a defendant's right to effective assistance of counsel (*People v. Macerola*, 47 N.Y.2d 257, 264, *supra*), we hold that prior to accepting a guilty plea from a jointly represented defendant, the Court must ascertain, on the record, whether the "defendant's decision to proceed with his attorney is an informed decision" (*People v. Gomberg*, 38 N.Y.2d 307, 313, supra).[2] The problems of joint representation are no less acute at the plea bargaining stage than at the trial (see generally, Girgenti, *Problems of Joint Representation of Defendants in a Criminal Case*, 54 St. John's LR 55).

However, in a case where the court has accepted a guilty plea without first assuring that the defendant understands the risks of joint representation, a reversal of defendant's conviction on appeal will result only when there is a "significant possibility" that a conflict of interest existed (*People v. Macerola*, 47 N.Y.2d 257, 264, *supra*).

In the present case, the Court did not ascertain, prior to accepting defendant's plea, that his decision to proceed with joint representation was an informed decision. However, on the presentencing motion to withdraw the plea, the Court did hold a hearing to determine whether a conflict of interest existed. While this is not the preferred procedure, the findings of fact made by the Court after this

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2. The rule under the Federal Constitution differs, as the Supreme Court recently held (*Cuyler v. Sullivan*, 446 U.S. 335). Under the Sixth Amendment to the United States Constitution, the Trial Court need not initiate an inquiry of jointly represented defendants unless it has reason to know that a conflict may actually exist. Further, a defendant who raises no objection to multiple representation at trial must demonstrate that an actual conflict of interest existed to adversely affect his lawyer's performance, to establish a violation of the Sixth Amendment.

hearing and affirmed by the Appellate Division, are entitled to great weight on review in this Court. Thus, the Court below found that original counsel had properly apprised defendant of the alternatives open to him, and that defendant was not subjected to any undue pressures in accepting the plea bargain arranged by that counsel.

The Court thus did not credit defendant's claim that prior counsel had induced him to plead guilty to help his co-defendant. While defendant's substituted counsel argued that an intrinsic conflict of interest existed, because prior counsel did not inform defendant of the possibility of success if he went to trial, the Court found that counsel had in fact fully apprised defendant of all of his alternatives. Where, as here, defendant has had an opportunity to establish, on the record, the basis for his claim of a conflict of interest and has failed to do so, it cannot be said that it was error as a matter of law for the Appellate Division to have affirmed the decision of Supreme Court concluding that no significant possibility of a conflict of interest existed.

Accordingly, the order of the Appellate Division should be affirmed.

JONES, FUCHSBERG and MEYER, JJ. (dissenting)

The order of the Appellate Division should be reversed, the plea vacated and the case remitted to the Supreme Court for further proceedings. A post-plea inquiry does not satisfy the requirement that, before accepting a plea from a defendant who is jointly represented, *the court* must ascertain on the record whether the defendants perceive the risk of such representation. Such queries are of a kind with those which are called for when a defendant desires to exercise the right to proceed *pro se* (see *People v. Kelly*, 44 N.Y.2d 725, affg 60 AD2d 220, 223; *People v. McIntyre*, 36 N.Y.2d 10, 17); both are rooted in the key role the right to counsel plays under our adversary system, something which lay defendants usually will not fully appreciate. And, even more so than on a disposition after

trial, whose fuller record will have illumined the possibility of prejudice more adequately, *post–hoc* rationalization of the harmlessness of a court's failure to make inquiry when a plea is taken contains a substantial risk of unreliability (cf. *People v. Purdy*, 53 N.Y.2d 806; *People v. Rolston*, 50 N.Y.2d 1048; *People v. Grant*, 45 N.Y.2d 366, 377–380; cf. *People v. Hodge*, 53 N.Y.2d 313, 321 [right to counsel at preliminary hearing]; *People v. Jones*, 47 N.Y.2d 409, 417 [right to public trial]).

The difficulty with a retrospective hearing to determine whether there was in fact a conflict is that it requires not only the recapture of the dynamics of the plea bargaining (or when the issue is raised after trial, of the trial), in itself a difficult enough pursuit, but also the persuasion of the judge who failed to see the possibility of conflict in the first place and the attorney whose acumen, if not integrity, may be at stake, that they were in error and should admit it. True, in any particular case, including the instant case, the fact may, indeed, be that there was no conflict, but the odds against a finding of conflict resulting from such a hearing are so great and the effect upon the appearance of justice of a procedure which appears to pit lawyer and judge against client is so devastating that we can no longer agree to use of the procedure. The alternative is entirely free of such flaws and is simple in both operation and concept: a trial judge faced with two defendants represented by the same attorney must inform each of his right to separate counsel and that, if he cannot afford counsel, the court will appoint counsel to advise him concerning the possibility of conflict and to represent him if a real possibility of conflict exists. Advised of his rights before the conflict arises, each defendant can make an intelligent choice. Should he elect to proceed with joint counsel after being so informed by the court or after consultation with separate counsel, he would then be foreclosed by his choice from thereafter raising the issue of conflict. The only difference between the present rule and that suggested is that the latter is mandatory, but the instances in which the present rule is honored in the breach make clear that justice requires no less.

* * * * * * * * * * * * * * *

Order affirmed. Opinion Per Curiam. All concur except Jones, Fuchsberg and Meyer, JJ., who dissent and vote to reverse in a memorandum.

Decided October 27, 1981

Opposition

No. 81-1188

Office - Supreme Court, U.S.
FILED
FEB 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

RONALD MONROE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

MARIO MEROLA
District Attorney
Bronx County
Attorney for Respondent
215 East 161st Street
Bronx, New York 10451
(212) 590-2000

ALAN D. MARRUS
ALAN D. KAPLAN
Assistant District Attorneys
Of Counsel

Question Presented

Whether a writ should issue to review a state court decision based entirely on state law, which employed a factual determination made by the state court, and is totally consistent with this Court's prior decisions?

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No. 81-1188

IN THE

Supreme Court of the United States

October Term, 1981

RONALD MONROE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of New York, respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the New York Court of Appeals' opinion in this case.

Statement of the Case

The Indictment

By an indictment filed on February 2, 1978, petitioner, acting in concert with Frederick Bryant,* was charged with Attempted Murder in the Second Degree, Assault in the Second Degree, Assault in the First Degree, and two counts of Criminal Possession of a Weapon in the Second Degree. Indictment Number 6/1978.

The Plea

On June 20, 1978, pursuant to a plea and sentence bargain, petitioner pleaded guilty to Attempted Assault in the First Degree, in satisfaction of all the charges in the instant indictment. Petitioner was allowed to enter his guilty plea with the understanding that his sentence would be an indeterminate term of imprisonment not to exceed four years (P. 5).**

Petitioner admitted that on December 10, 1977, in The Bronx, New York, he and Frederick Bryant shot Ernest Nelson in the face with a .38-caliber revolver, causing serious injury that necessitated hospital confinement for seven

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* Frederick Bryant, petitioner's business associate and long-term companion (S. 12), pleaded guilty to Assault in the First Degree and was sentenced to an indeterminate term of imprisonment not to exceed nine years (Loguen, J.). Bryant appealed his conviction to the Appellate Division, First Department, claiming that his sentence was excessive. The First Department unanimously affirmed his conviction, without opinion (78 A.D.2d 1017).

** Numbers preceded by "P" refer to the plea minutes of June 20, 1978; those preceded by "M" refer to the minutes of petitioner's motion to withdraw his guilty plea, held January 24, 1979; and those preceded by "S" refer to the sentence minutes of March 16, 1979.

days (P. 3, 5). Bryant fired the actual shot that injured Nelson. Petitioner and Frederick Bryant were arrested after a short chase, and the weapon* used in the crime was found in their vehicle (P. 3, 5).

Petitioner acknowledged that he had discussed his case with his retained counsel, Otto Fusco, who also represented Frederick Bryant (P. 2, 5). By questioning petitioner, the court determined that no improper inducements had caused him to plead guilty, and that he waived his rights to trial by jury and to confront witnesses against him. Satisfied that petitioner's plea was made in a knowing, voluntary and intelligent manner, the court accepted it. At the same proceeding, the court also accepted Frederick Bryant's plea of guilty to Assault in the First Degree and promised to sentence him to an indeterminate term of imprisonment not to exceed nine years (P. 2, 4, 7).

Petitioner's Motion to Withdraw His Guilty Plea

On September 25, 1978, petitioner retained new counsel, George R. Spitz, and orally moved to withdraw his guilty plea, claiming that Otto Fusco's joint representation of him and Frederick Bryant had created a conflict of interest. Specifically, petitioner contended that Mr. Fusco had told him that if he pleaded guilty, Frederick Bryant would be treated more leniently.

On January 24, 1979, a hearing regarding petitioner's allegations was conducted by Justice Loguen. The court questioned and heard Mr. Fusco, the prosecutor, Mr. Spitz and petitioner.

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* Subsequent proceedings revealed that two weapons were found in the vehicle.

Mr. Fusco's Statement

Petitioner waived his attorney-client privilege in order to allow Mr. Fusco to speak freely at the hearing (M. 3). Mr. Fusco, speaking as an officer of the court, categorically denied ever having told petitioner to plead guilty in order to help Frederick Bryant and asserted that he had perceived no conflict of interest whatsoever in his joint representation of the co-defendants (M. 3, 7). Mr. Fusco further explained that no conflict of interest ever existed because petitioner and Frederick Bryant acted in concert when they shot the complainant. Motivated by petitioner's desire for revenge, due to a dispute that had occurred between petitioner and the complainant three days prior to the shooting, the two men armed themselves and went looking for their victim (M. 1, 3, 4, 7). Indeed, two loaded and operable guns were later found in their getaway car (M. 11, 12, 13; S. 3). Although only Frederick Bryant's bullet struck the complainant, Mr. Fusco reiterated that "they were both acting in concert in getting this individual" (M. 5).

After considering the facts and circumstances of this case, Mr. Fusco, utilizing "much of his energy" and much "maneuvering", obtained what he considered "very fair" and "good" pleas for both defendants, each of which took into account their individual involvement. Mr. Fusco asserted that he fully explained to both defendants the possible consequences of going to trial and made them aware of all their available options before they pleaded guilty (M. 6-8). In summing up, Mr. Fusco stated that he "never" coerced anyone to take a plea and that "if this was a triable case in my mind, I'd be the first one to try it" (M. 8-9).

The Court's Questioning of Petitioner

In response to questioning by the court, petitioner admitted that he pled guilty on June 20, 1978, and recalled stating at that time that he was not promised anything other than a sentence which would not exceed four years, that he discussed the case with his attorney and that he was aware that he forfeited his right to a jury trial (M. 9). He did not attempt to refute any of the statements made by Mr. Fusco.

Mr. Spitz' Statement

Mr. Spitz made the general statement that "as a matter of law . . . a conflict of interest" existed, but did not substantiate his claims with any facts or explanations. He merely asserted that petitioner had not fully appreciated his possibilities of success at trial (M. 11).

The Prosecutor's Statement

The prosecutor noted that the People had a strong case, and corroborated Mr. Fusco's statement of the facts. Additionally, he informed the court that co-defendant Bryant had made a full stenographic confession that further substantiated Mr. Fusco (M. 13).

The Decision on Petitioner's Motion to Withdraw His Plea

On March 16, 1979, the court made the following findings regarding the hearing of January 24, 1979. The court found that Mr. Fusco's statements at the hearing were credible and were corroborated by the District Attorney's Office (S. 6, 8). Petitioner had the primary motive for

retaliation against the complainant (S. 6, 7). After conferring with his clients, Mr. Fusco ascertained that there was no conflict of interest and he advised both defendants of all their alternatives, including the possible consequences of going to trial or taking a plea (S. 6). A very fair plea was subsequently obtained for petitioner due to the effective assistance of counsel, and the plea was "made freely with full knowledge of the consequences and with the full benefit of legal counsel" (S. 7).

The court concluded that no adequate showing had been made that petitioner was deprived of the effective assistance of counsel due to joint representation and that no conflict of interest existed (S. 8, 9). Thus, petitioner's motion to withdraw his guilty plea was denied (S. 9).

The Sentence

After denying petitioner's motion to withdraw his guilty plea, the court sentenced petitioner to an indeterminate term of imprisonment not to exceed four years (S. 13-14). The court was earlier informed by the prosecutor that petitioner had written a letter, dated June 8, 1978, which became part of the court papers. In this letter, petitioner described how the complainant allegedly attacked him on December 7, 1977, and went on to admit that "On December 10, 1977, I seen him [complainant] and took my own action because of what was done to me" (S. 4).

The Decision of the Appellate Division, First Department

By an order entered December 20, 1979, the Appellate Division, First Department, unanimously affirmed, without opinion, petitioner's judgment of conviction. *People* v. *Monroe*, 73 A.D.2d 563 (1st Dept. 1979).

The Decision of the New York State Court of Appeals

In a written opinion, dated October 27, 1981, the New York Court of Appeals affirmed petitioner's conviction in a 4-3 decision. *People* v. *Monroe*, 54 N.Y.2d 35 (1981). The court based its decision on its prior holdings in *People* v. *Macerola*, 47 N.Y.2d 257 (1979) and *People* v. *Gomberg*, 38 N.Y.2d 307 (1975) and held that petitioner did not show that a significant possibility of a conflict of interest existed. Additionally, in affirming the findings of the hearing court, the court held that no conflict of interest existed and that petitioner received the effective assistance of counsel.

ARGUMENT

POINT

A writ should not issue to review a state court decision based entirely on state law, which employed a factual determination made by the state court, and is totally consistent with this Court's prior decisions.

Petitioner contends that a writ of certiorari should be issued to review the determination of the New York Court of Appeals that petitioner, on the facts of this case, failed to establish that a significant possibility of a conflict of interest existed to warrant a reversal of his conviction. Since this determination only involves an issue of state law, based on a factual determination by a state court, which was affirmed by two appellate courts, and is entirely consistent with this Court's decision in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), a writ should not be granted.

It is well accepted that this Court will not review state court decisions based solely on state law, and will not decide federal issues raised for the first time in a petition for a writ of certiorari. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). Additionally, it is clear that state decisions which involve factual issues do not justify the exercise of certiorari jurisdiction. *Tacon* v. *Arizona,* 410 U.S. 351 (1973).

Throughout the state court proceedings in the instant case, petitioner's sole contention was the general assertion that an "intrinsic" conflict of interest existed due to the joint representation of petitioner and his co-defendant, a friend and business associate, by their retained counsel at the time of their plea. Because of this alleged conflict, petitioner contended that the plea court erred by accepting the pleas of petitioner and his co-defendant before it conducted an on the record inquiry, as required by New York state law (*People* v. *Gomberg, supra* at 313), to determine if petitioner was aware of the possibility of a conflict. No federal question was ever presented to the state courts.

The New York Court of Appeals based its decision on the question of state law that had been presented to it. The court ruled that the pre-trial, on the record, inquiry requirement of its *Gomberg* decision extended to plea-bargaining situations as presented in the instant case. Using the state law formula, which requires both a lack of an inquiry and the existence of a "significant possibility" of a conflict of interest in order to reverse a conviction (*People* v. *Macerola, supra*), the court found that the full hearing conducted before petitioner's sentencing, to determine

whether he should be allowed to withdraw his guilty plea, adequately substituted for a pre-plea inquiry and that petitioner, nonetheless, failed to establish the basis of his claim, on the record, either at the hearing or on his appeal. Giving great weight to the findings of fact of the hearing court which had already been affirmed by the intermediate appellate court, i.e., that no conflict of interest existed, that petitioner and his co-defendant were given effective assistance of counsel and advised of all their alternatives, and that petitioner's guilty plea was knowing, voluntary and intelligent, and relying upon its previous decisions, the New York Court of Appeals affirmed petitioner's conviction.* No federal issues were raised in state court by petitioner, and the state court decision, based exclusively on state law, incorporated the affirmed findings of fact of a lower state court. Thus, this Court lacks jurisdiction to review the instant case. 28 U.S.C. §1257(3). Moreover, it is interesting to note that although the opinion of the New York Court of Appeals is barren of federal authority, petitioner failed to make a motion to amend the remittitur as a last effort to determine if the court passed upon any constitutional issues. *See Stern and Gressman, Supreme Court Practice,* 5th ed. 1978, §3.29.

Petitioner's present claim, that he was deprived of his constitutional rights by the state court's refusal to allow him to withdraw his guilty plea, is raised in his petition for the first time. In support of his contention, petitioner erroneously states that the majority of this Court, in its

* Although petitioner asserts that the New York Court of Appeals "misapplied" this Court's rule in *Cuyler* v. *Sullivan, supra,* it is evident that the New York Court of Appeals merely made a passing reference to *Cuyler,* in a footnote, which had absolutely no bearing on its judgment.

decisions in *Santobello* v. *New York*, 404 U.S. 257 (1971), and *Dukes v. Warden*, 406 U.S. 250 (1972), held that a defendant has a constitutional right to withdraw a plea of guilty any time prior to sentencing, absent a showing of specific and substantial harm by the prosecution. It is clear, however, that this is the minority position in both the *Santobello* and *Dukes* cases and never received the support of more than three justices of this Court at any one time. Justice Brennan was originally with the minority in the 4-3 decision in *Santobello*, in which the majority held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello* v. *New York, supra*, at 262. The orientation of this holding is obviously inapplicable to the case at bar. Nevertheless, Justice Brennan abandoned the minority position and delivered the 6-1-2 majority opinion of the Court in *Dukes*, which held that if a defendant wished to withdraw a guilty plea, he was required to give a reason for the vacatur that had merit. The *Dukes* case, along with the case at bar, presented situations in which nothing on the record existed in support of the defendant's position, and the guilty pleas were upheld. Thus, even when treating the instant case as one in which a "guilty plea issue" is involved, it is clear that the decision of the New York Court of Appeals was proper.

The instant case, however, involves the issue of joint representation of co-defendants. This Court's most recent treatment of this topic appears in its decision in *Cuyler* v. *Sullivan, supra*. The *Cuyler* decision departs from

the rulings of the New York Court of Appeals, in that it does *not* require a trial court to conduct an inquiry into the propriety of multiple representation, and it requires a defendant to show that an actual conflict existed, rather than the mere possibility of one. Thus, two conclusions are mandated from a reading of the *Cuyler* decision. Firstly, under Federal law, petitioner's rights were more than adequately protected by the pre-sentence hearing, and because petitioner additionally failed to show and can never show on the record, that an actual conflict existed, he would surely lose on the merits in this Court. Secondly, it is clear that the total emphasis of petitioner's state court argument was solely aimed at attacking his conviction based on the very protective New York joint representation case law.

Finally, contrary to petitioner's assertions, the *Cuyler* decision does not distinguish between defendants who pled guilty or those who were found guilty after trial. No differentiation is made in this case and its basic precepts are easily applied regardless of whether a plea or trial is involved. Indeed, the fact that the Court made references to its opinion in *Dukes*, where a guilty plea was involved, in its *Cuyler* opinion, indicates that no differentiation was intended.

In sum, the instant case lacks jurisdiction for certiorari review and while important to petitioner, presents no issue of legal consequence. Review of this case would not benefit the administration of justice. Therefore, this case is not an appropriate one for the issuance of a writ of certiorari.

Conclusion

The petition for a writ of certiorari should, in all respects, be denied.

Respectfully submitted,

MARIO MEROLA
District Attorney
Bronx County
Attorney for Respondent

ALAN D. MARRUS
ALAN D. KAPLAN
Assistant District Attorneys
Of Counsel

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